

## St. John's Law Review

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Volume 44  
Number 1 *Volume 44, July 1969, Number 1*

Article 13

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December 2012

### CPLR 3101(d): Identity of Witnesses Learned Subsequent to Happening of Occurrence Held To Be Material Prepared for Litigation

St. John's Law Review

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#### Recommended Citation

St. John's Law Review (1969) "CPLR 3101(d): Identity of Witnesses Learned Subsequent to Happening of Occurrence Held To Be Material Prepared for Litigation," *St. John's Law Review*: Vol. 44 : No. 1 , Article 13.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss1/13>

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that the expense of publication, an "auxiliary expense" (*i.e.*, payable by litigants to third persons other than public officers) was not contemplated by New York's comprehensive poor persons statutes.

In asserting that equal access to the civil courts was among the fourteenth amendment's primary objectives, the court asserted that the principles enunciated in *Griffin v. Illinois*<sup>15</sup> have equal validity in civil cases:

[B]ecause the establishment of civil courts for enforcing claims and vindicating legal rights is so fundamental, the State cannot close the system to any person because of poverty.<sup>16</sup>

In Mrs. Jeffreys' situation, her very access to the courts for divorce upon the grounds of abandonment was predicated upon her service of summons by publication. Furthermore, since a marriage cannot be dissolved except by "due judicial proceeding,"<sup>17</sup> the courts provided the only forum wherein relief might be obtained. The court therefore required that the City of New York pay her publication costs so as to afford her the access to the courts demanded by equal protection.

Consistent with its earlier opinion, the court indicated that applications for leave to serve a summons by publication under the poor persons statutes must be made by notice to the City Treasurer within New York City, and to the County Attorney outside the City.<sup>18</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(d): Identity of witnesses learned subsequent to happening of occurrence held to be material prepared for litigation.*

In *Hartley v. Ring*,<sup>19</sup> the court took a major step in effectuating the policy set forth in *Allen v. Crowell-Collier Publishing Co.*<sup>20</sup> by enunciating the following rule:

A party should disclose upon an examination before trial the names of all witnesses observed by the party to be present at the scene of the occurrence out of which the lawsuit arose or whose identity was supplied to the party at the said scene.<sup>21</sup>

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<sup>15</sup> 351 U.S. 12 (1956). *Griffin*, after conviction, sought but was denied a free transcript essential to access to the appellate courts. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19.

<sup>16</sup> 58 Misc. 2d at 1053, 296 N.Y.S.2d at 87.

<sup>17</sup> N.Y. CONST. art. I, § 9 (1954).

<sup>18</sup> See *Jeffreys v. Jeffreys*, 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. Kings County 1968).

<sup>19</sup> 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969).

<sup>20</sup> 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 324-25 (1968).

<sup>21</sup> 58 Misc. 2d at 623, 296 N.Y.S.2d at 399.

Prior to the enactment of the CPLR, the names of witnesses were not often the proper subject of disclosure.<sup>22</sup> However, two theories developed as exceptions to this rule. The first, originally expressed in *Pistana v. Pangborn*,<sup>23</sup> was to the effect that the identity of an "active participant" in the occurrence was a proper subject for disclosure; and the second, that where the party seeking disclosure was physically unable to obtain the names of witnesses while the other party was so able, disclosure would be granted.<sup>24</sup>

Since the enactment of the CPLR, the "active participant—passive observer" distinction has all but been obliterated. Where the identity of a witness is gained through direct observation at the time of the event, it should be subject to disclosure regardless of whether the witness was a so-called participant or a passive observer.<sup>25</sup>

Nevertheless, there still remains some vestige of the pre-CPLR rule in the area protected by CPLR 3101(d). The court in *Hartley* stated that

where a party obtains knowledge of the identity of witnesses through an investigation after the happening of the occurrence as distinguished from personal observation at the scene, such knowledge constitutes material prepared for litigation. . . .<sup>26</sup>

In this respect the court is at odds with Professor Siegel, who maintains that a witness' name can never be "created" for the litigation, and therefore, a fortiori, the names of all witnesses should be made available through pre-trial disclosure.<sup>27</sup>

While there is no possible rationale for the continuation of the participant—non-participant distinction, arguments have been made

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<sup>22</sup> *Id.* at 620, 296 N.Y.S.2d at 395, and cases cited therein. See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.11 (1968).

<sup>23</sup> 2 App. Div. 2d 642, 151 N.Y.S.2d 742 (3d Dep't 1956).

<sup>24</sup> *Dickinson v. Chock Full O'Nuts*, 57 Misc. 2d 991, 293 N.Y.S.2d 785 (Sup. Ct. Nassau County 1968); *Maffeo v. Comtois*, 55 Misc. 2d 779, 286 N.Y.S.2d 550 (Sup. Ct. Albany County 1968). See also *Lauren v. Gollin*, 54 Misc. 2d 512, 282 N.Y.S.2d 811 (Sup. Ct. Nassau County 1967); *Majchrzak v. Hagerty*, 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966); 7B MCKINNEY'S CPLR 3101, supp. commentary 12 (1968).

<sup>25</sup> *Rivera v. Stewart*, 51 Misc. 2d 647, 648, 273 N.Y.S.2d 644, 645 (Sup. Ct. Monroe County 1966): "[I] am unable to see a valid distinction between . . . a person who assists a fallen plaintiff to his feet and another who stands by watching." The *Rivera* rule permitting discovery of all persons at the scene of the accident has been followed in *Sanfilippo v. Baptist Temple, Inc.*, 52 Misc. 2d 767, 276 N.Y.S.2d 936 (Sup. Ct. Monroe County 1967) and in *Dickinson v. Chock Full O'Nuts*, 57 Misc. 2d 991, 992, 293 N.Y.S.2d 785, 786 (Sup. Ct. Nassau County 1968): "This court subscribes to the view that the only legitimate objections to discovery of the names of the witnesses would be those found in CPLR 3101 subds. (c) [attorney's work product] and (d) [material prepared for litigation]". See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.11 (1968).

<sup>26</sup> 58 Misc. 2d at 624, 296 N.Y.S.2d at 399.

<sup>27</sup> 7B MCKINNEY'S CPLR 3121, supp. commentary 13 (1968).

that there is reason to allow a party to reap the fruits of its *subsequent* investigation.<sup>28</sup> This, of course, is subject to the proviso in CPLR 3101(d) that the identification is immune from disclosure unless it cannot be duplicated and withholding it will result in undue hardship. *Hartley* recognizes and perpetuates this dichotomy.

To reduce costly court battles and lengthy delays it would appear that even this last vestige should also disappear. The advantages to be gained by the policy of liberal disclosure far outweigh any contingent detriment that might be experienced by allowing one party to profit from the results of a subsequent investigation by his adversary. If the end to be sought by the judicial process is justice in the abstract, then complete disclosure is a means to that end. A self-serving refusal to disclose the identity of hostile witnesses does not serve justice.

*CPLR 3101(d): Conflict between departments over burden of proof relating to material prepared for litigation.*

In *Dikun v. New York Central Railroad*,<sup>29</sup> a wrongful death action, plaintiff's motion to examine defendant's employee, a crew member of a train involved in an accident which gave rise to the cause of action, was granted. Defendant sought to prevent the examination of its employee by invoking CPLR 3101(d)(2) which provides that "any writing or anything created by or for a party or his agent in preparation of litigation" shall not be obtainable by the other party.<sup>30</sup> In the application of this section the courts are in general accord that "employee statements made in the regular course of business stating what they observed and did are not material prepared for litigation protected from discovery by CPLR 3101(d)."<sup>31</sup>

The party seeking to avoid disclosure has the burden of proving that the material was prepared *solely* for litigation and not in the regular course of business — and that burden is *not* met by merely routing all material through an attorney. Divergent conclusions have been drawn by the several departments as to how this burden may be met.

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<sup>28</sup> See, e.g., *Rios v. Donovan*, 21 App. Div. 2d 409, 413, 250 N.Y.S.2d 818, 822 (1st Dep't 1964): "While the policy of the CPLR is to broaden disclosure procedures, discovery should not be permitted to substitute for independent investigation of facts which are *equally available to both parties*." (Emphasis added.)

<sup>29</sup> 58 Misc. 2d 439, 295 N.Y.S.2d 830 (Sup. Ct. Jefferson County 1968).

<sup>30</sup> This prohibition against disclosure may only be invoked in the absence of the court's finding that, because of a change in conditions, the material can no longer be duplicated and to withhold it will result in injustice or undue hardship. CPLR 3101(d).

<sup>31</sup> 58 Misc. 2d at 440, 295 N.Y.S.2d at 832, and cases cited therein. See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50 (1968).